

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2006-0921, State of New Hampshire v. Torrey Smith, the court on April 10, 2008, issued the following order:**

The defendant, Torrey Smith, appeals his convictions for burglary, criminal threatening and criminal restraint. He argues that the trial court erred in failing either to give a curative instruction or to allow him to present rebuttal evidence in response to the State's closing argument. We affirm.

When we review whether a closing argument constituted reversible error, we review the trial court's decision for an unsustainable exercise of discretion because the trial court is in the best position to gauge any prejudicial effect that the prosecutor's closing remarks may have had on a jury. State v. Mussey, 153 N.H. 272, 276-77 (2006). An improper statement made by the State during closing argument may, under certain circumstances, constitute prosecutorial overreaching requiring a new trial. *Id.* at 279. To determine whether an improper statement requires a new trial, we balance the following factors: (1) whether the prosecutor's misconduct was deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court's instruction likely could have affected the outcome of the case. *Id.* at 280.

In this case, it is difficult to ascertain whether the prosecutor's statements were improper. They were made in the context of describing the events of the three-day period that gave rise to the charges. In light of the prior discussion with the trial court that resulted in the exclusion of some evidence about the victim's alleged jealousy, we will assume, however, that the prosecutor's statements were error and that the court's general instruction to the jury concerning any conflict between the evidence and statements by counsel was insufficient to correct any error. Based upon the record before us, we conclude that any prejudice was minimal and did not affect the outcome of the case.

The evidence supporting the defendant's convictions was overwhelming. The victim testified in detail about the defendant's actions and her testimony was corroborated both by several witnesses and by physical evidence, including photographs of her injuries. Given this record, we find no reversible error. *See State v. Deschenes*, 155 N.H. 71, 80 (2007) (error harmless if State establishes beyond reasonable doubt that alternative evidence of defendant's guilt is of

overwhelming nature, quantity or weight, and if inadmissible evidence is merely cumulative or inconsequential in relation to strength of State's evidence of guilt).

Affirmed.

BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**